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No. 89-250

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER,
AND ROBERT WEINER, SR. AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN WEINER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Personal Representative of
the Estate of Steven Weiner,

Respondents

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Blue Cross and Blue Shield of Maryland, Inc. ("BCBSM"), respectfully submits this Reply in Support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in this case. (The Eleventh Circuit's Opinion is reprinted in Appendix C hereto.)

THE ELEVENTH CIRCUIT'S DECISION MISAPPLIES A DOCTRINE CENTRAL TO THE CONCEPT OF FEDERALISM AND SERIOUSLY UNDERMINES THE IMPORTANT FEDERAL POLICIES WHICH ARE THE FOUNDATION OF ERISA

In BCBSM's Petition for a Writ of Certiorari ("Petition"), BCBSM established that the Eleventh Circuit erred by invoking the *Rooker-Feldman*[1] doctrine and thereby failing to enforce the unique and extraordinary preemptive power of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et. seq.*, as announced by Congress and by this Court. It is not surprising that, in no case other than the case at bar, has any court ever applied the *Rooker-Feldman* doctrine where ERISA preemption is involved.

Respondents in their Opposition attempt to misdirect the true focus of this case. They emphasize the right of a state court to determine its own jurisdiction. (Respondents' Brief at 6-9). Of course a state court has the right to determine its own jurisidiction—but this is irrelevant to the issue in this case.

Here, the issue is the right—indeed, the obligation—of a federal court to protect important federal interests which are endangered by state court action. In such a situation, a state court's determination of its own jurisdiction does not address the problem and may even compound it.

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[1] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

RESPONDENTS MISCHARACTERIZE THE RECORD IN AN EFFORT TO AVOID THE CONCLUSION THAT THIS IS AN ERISA CASE

Confronted with the challenge to justify the Eleventh Circuit's circumvention of important policies as articulated by Congress and by this Court, Respondents rely, in part, upon an argument that their claims were not governed by ERISA, because the plans at issue were not ERISA plans. This is not correct, and is, in any event, a red herring; Respondents concede that the issue of whether their claims were covered by ERISA was not considered by the Eleventh Circuit (which premised its holding solely upon its view of the propriety of federal court abstention.) (Respondents' Brief at 6; *see* Eleventh Circuit Opinion (Appendix at 16 and n.2).)

BCBSM has discussed the facts and law which established that the plans at issue were ERISA plans. (*See* BCBSM's Petition at 4-6, 16-18.) We would respond herein to certain statements made by Respondents in their Opposition, lest silence be viewed as acquiescence to those contentions.

The issue of whether Respondents' claims were governed by ERISA has never been tried.[2] The only court which has considered the question of whether the plans were governed by ERISA was the Florida Fourth District Court of Appeal (the "State Appellate Court"). Following this Court's decisions in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987) and *Metropolitan Life Insurance Co. v. Taylor*. 481 U.S. 58 (1987) (which were rendered after the decision of the State Trial Court in the case at bar), BCBSM argued before the State Appellate Court that, even upon the scanty record in the State Trial Court (which never considered the ERISA

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[2]It is undisputed that, if the claims asserted by Respondents are ERISA claims, they do not fall within the area of ERISA in which federal and state courts have concurrent jurisdiction. (*See* 29 U.S.C. § 1132(a)(1)(b), and (e)(1) (actions by participants to clarify rights or obtain benefits to under an ERISA plan.))

issue), the Appellate Court could dismiss the action on the basis of ERISA preemption. BCBSM argued in the alternative that, in light of the sparse record on this crucial issue, a remand for a full trial upon that issue was appropriate.

Remarkably, in one paragraph of its Opinion, the State Appellate Court held that the employee benefit plans at issue were not ERISA plans. It rested its holding upon the conclusion that "[t]he evidence, *although disputed*, reflects that the plaintiff was a sole proprietor who simply purchased a group policy for his family." (Appendix at 48; emphasis added.) Thus, the State Appellate Court effectively granted summary judgment on appeal, resolving an issue which had never been tried, based upon what the Court itself characterized as "disputed" material facts. That is the sole ruling upon the issue of whether this case was governed by ERISA and was therefore within the exclusive province of the federal courts.

We respond *seratim* to several factual arguments made by Respondents.

1. Respondents contend that, after an initial endorsement, there were "no further agreements or endorsements" made to the policies. (Respondents' Opposition at 4.) In fact, the Allied Gasoline Retailers' Association of Florida ("AGRA") endorsed the Group Plan effective in 1981. It was this endorsement which allowed AGRA's members and their employees (including Respondents) to enroll in the Group Plan. (*See* Petition at 5.)

2. Respondents contend that the Group Plan was "never established or maintained by an employer or association of employers" and did not "comply with ERISA's reporting requirements." (Respondents' Opposition at 4.) In fact, the group plan was *both* established and maintained by AGRA, an association of employers—which by definition under ERISA is an "employer"—to cover the employees of its member companies. Also, the Weiner Service Station, an employer, established and maintained a plan for its employ-

ees (Robert Weiner, Sr. and Jr.) by joining AGRA, by subscribing to the group plan which covered only employees of member companies (and their dependents), by agreeing to be financially responsible for the premiums and by paying the premiums.

Respondents argue that the group plan was "established and maintained" by Association Financial Services, Inc. ("AFSI")—an "entrepreneurial business"—rather than by AGRA. It is true that AFSI, a company in the business of arranging group insurance coverage for trade associations, obtained the agreement of BCBSM to underwrite group plans endorsed by state service station dealer associations which were affiliated with the Service Station Dealers of America. But until an individual state association *endorsed* the plan and offered it to its member companies, no state plan came into existence. And until a member company subscribed to the plan and promised to pay the premiums, its employees were not covered. Thus, for ERISA purposes, the state association and the member companies "establish or maintain" the plan. (In fact, they do both.)

The Department of Labor Regulations set forth the limited situations where a group insurance program will *not* be considered an ERISA employee welfare benefit plan. *See* 29 CFR §2510.3-1(j). According to the Regulations, ERISA does not cover group insurance offered by an employer only where "*no contributions are made by an employer. . . .*;" the "*sole functions* of the employer . . . are, *without endorsing the program*, to permit the *insurer* to publicize the program to employees . . ., to collect premiums . . . [from employees] and to remit [the premiums] to the insurer;" and "the employer . . . receives no consideration in cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services rendered in connection with payroll deductions. . . " 29 CFR §2510.3-1(j); *See Donovan v. Dillingham*, 688 F.2d 1367, 1373 n.11 (11th Cir. 1982).

It cannot reasonably be disputed that:

(a) AGRA *endorsed* the SSDA group plan.

(b) Both the Blue Cross Special Contract and the Blue Shield Special Contract provide that the *"Company* shall pay" the premiums each month for each eligible employee. Thus, the plan documents explicitly provide that the *employer not the employee* is responsible for payment of premiums.

(c) AFSI had no *direct dealings* with the employees of AGRA's member companies with respect to enrolling them in the plan—AGRA itself did. Robert Weiner's only contact was with AGRA's field representative.

(d) AGRA received a per capita administrative fee for endorsing and marketing the plan.

Finally, the group plan complied with ERISA's administrative and reporting requirements. In any event, failure to comply with these requirements does not prevent ERISA coverage of a plan if one, in fact, has been established, or evidence the lack of a plan in the first instance. *Donovan*, 688 F.2d at 1372; *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985); *Adam v. Joy Mfg. Co.*, 651 F. Supp. 1301, 1306 (D.N.H. 1987).

3. Respondents contend that Mr. Weiner ran a service station as a sole proprietor, that his purpose in purchasing insurance was to provide coverage for his family, and that while a son worked for him, no insurance was purchased for any other "employees." (Respondents' Opposition at 4.) However, in his deposition taken in the case, on April 25, 1986, Robert Weiner, Sr. testified that he had no other employees and that the other individuals who worked at the station were "independent contractors." (Weiner deposition at 8.)

Apparently, Mr. Weiner chose (for obvious reasons) to characterize only himself and his son as employees and to

characterize the other persons who worked at his station (one pumping gas and one fixing cars) as "independent contractors." Assuming *arguendo* that Mr. Weiner was truthful, it is obvious that Respondents' reliance on the fact that "no insurance was purchased for any other employees" to support an argument that the group plan was not an ERISA plan is specious since there were no other employees. In any event, it is undisputed that "employee status" was required for eligibility under the group plan and that the Weiner's could only be eligible because of their employee status—not because of their familial ties. (The insurance documents in this case show uniformly that coverage was limited to employees of member companies and their dependents and that coverage ended when employment ended.)

Finally, it is of no significance to argue that an association-endorsed health insurance plan covering the employees of the family business is not an ERISA plan. Many member companies of trade associations are family businesses. By participating in a group plan through the association, they can obtain insurance on more favorable terms than they could individually because of their small size. Their individual health claims are cumulated to determine the experience rating of the group and the ultimate cost of the insurance to the group. That is why ERISA defines "employer" to include a trade association, and why the Department of Labor Regulations define "employer" to include any business with at least one common law employee. (*See* 29 C.F.R. § 2510.3-3.)

4. Respondents contend that the plans at issue here were established and maintained by "entrepreneurial businesses" as opposed to an employer or employer organization, and were not, therefore, covered by ERISA. (Respondents' Opposition at 19-21.) This is simply untrue.

Respondents rely in part upon *Taggert Corp. v. Life and Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir.

1980) (Respondents' Opposition at 21). However, *Taggert* involved a multiple employer trust (commonly referred to as a "MET"), not an employer-association endorsed group plan. This distinction is critical. A MET is a *trust* formed solely for the purpose of selling group health insurance for employees of *unrelated* employers who do not belong to an employer association. A MET is *not* an ERISA plan—an employer association plan *is*. This has been the position of the United States Department of Labor at least since the publication of its News Release of August 6, 1979, where it said that "a multiple employer plan [ERISA plan] can be established only if the employers are *members of an organized group or association*," that "a MET arrangement is not a plan under ERISA if *unrelated* employers have merely adopted identically worded agreements that are offered by an independent third party," and that "where a MET claims to be established by an association of employers, the facts and circumstances will be examined to determine whether a *bona fide employer association* subject to the control of member employers exists." (Emphasis added).

In *Taggert*, the Fifth Circuit affirmed the holding of the District Court that the Trust at issue was not an ERISA plan. In reaching its holding, the District Court, 475 F. Supp. 124, 126 (S.D. Tex. 1979), summarized the relevant characteristics of a MET (as opposed to an ERISA plan):

> (1) The establishment of the plan by third party insurance brokers or "entrepreneurs" *acting for their own interests and not on behalf of an employer individually or as a group or association*;
>
> (2) The *lack of voice* in the management or operation of the plan *on behalf of* subscribing employers;
>
> (3) *Subscription* to the plan *by employees without the knowledge of their employers;*
>
> (4) The existence of a *profit-making enterprise* or a plan intended to be "actuarially sound."

(Emphasis added).

When an employer association group plan is involved, these characteristics do not exist since the broker establishing the plan is acting on behalf of an association, the subscribing employers have a voice through their association membership, employees cannot subscribe without the knowledge of their employer since only employers can subscribe, and the basic motivation for the plan is not profit-making but to provide a service to the employer members of the association.

In *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (Respondents' Opposition at 19), the Eleventh Circuit in a unanimous en banc decision, thoroughly reviewed the issue of ERISA benefit plans and discussed the *Taggert* case at length. Although the Eleventh Circuit agreed with the Fifth Circuit's decision that the Taggert plan was not an ERISA plan, it also held, contrary to the apparent holding in *Taggert*, that an employer purchasing group health insurance for its employees, even through a MET, *can* establish an ERISA plan.[3]

The Eleventh Circuit's reading of *Taggert* was subsequently adopted by the United States District Court for the District of Massachusetts in *Wickman v. Northwestern National Life Ins. Co.*, 9 EBC 1482 (D. Mass. 1987).

The Department of Labor News Release, referred to above, also states that even in a MET situation, each employer subscribing to the MET creates its own ERISA plan:

> In the department's view, a MET arrangement is not a plan under ERISA if unrelated employers have merely adopted identically worded agreements that are offered by an independent third party as a means to fund plan benefits. In this situation, *each employer has its own plan* and the organization which provides benefits under con-

[3]Since the present case does not involve a MET but a trade association group plan, it is even clearer here that the Weiner Station plan was an ERISA plan.

> tract with the employer is not itself an employee benefit plan but is instead the provider of a funding arrangement for the *various plans*. (Emphasis added).

Respondents also rely on *Wisconsin Educ. Ass'n Trust v. Iowa State Bd. of Public Instruction*, 804 F.2d 1059 (8th Cir. 1986) (Respondents' Opposition at 20), in which the issue was whether an insurance trust established by several unions was an ERISA employee welfare benefit plan. The Eighth Circuit held that the trust was not an ERISA plan because 30% of the individuals receiving benefits were not union members and ERISA requires participants of a union plan to be union members. In the present case, it is undisputed that eligibility was limited to employees of companies which were AGRA members, thus making the *Wisconsin Education* case inapposite.

In summary, the undisputed facts show that under ERISA, the Department of Labor ERISA Regulations, the Department of Labor News Release, and judicial decisions, both the AGRA plan and the Weiner Station plan were ERISA benefit plans as a matter of law: the AGRA plan at the association level, and the station plan at the individual employer level.

CONCLUSION

In its Opinion, the Eleventh Circuit has ignored the unique and extraordinary preemptive power of ERISA, as announced by Congress and this Court. The *Rooker-Feldman* doctrine is simply inapplicable to this case. Its enlargement by the Eleventh Circuit threatens the vital federal interests at stake.

For all of the foregoing reasons, BCBSM respectfully requests that this Court issue a Write of Certiorari to review the decision rendered in the captioned-matter by the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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